United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22169

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 22169-A

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JENS HORSTRUP,

Respondent.

On Petition to Review and Set Aside, Cross-Petition for Enforcement, and Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon a petition to review and set aside an order of the Board issued against the petitioner (Council) in No. 22169 and respondent (Horstrup) in

No. 22169-A, on June 19, 1967, following proceedings under Section 10 of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*).[1] In its answer in No. 22169, the Board has cross-petitioned for enforcement of its order. In No. 22169-A the Board has petitioned for enforcement. The proceedings were consolidated by the Court in an order of October 11, 1967. The Board's decision and order (R. 12-19, 33-35)[2] are reported at 165 NLRB No. 86. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act, the unfair labor practices having occurred at Eugene, Oregon. No issue of the Board's jurisdiction is presented.

COUNTERSTATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Council and its agent, Holstrup, violated Section 8(b)(7)(A) of the Act by picketing R.A. Chambers and Associates for an object of recognition and bargaining at a time when Chambers was lawfully

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[1] The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. A-1 through A-7.

[2] References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. "G.C. Exh." refers to exhibits of the General Counsel filed with the Court; "R. Exh." refers to exhibits of the Council and Holstrup (respondents before the Board). Wherein a semicolon appears, references preceding are to the Board's finding; those following are to the supporting evidence.

recognizing other unions and a question concerning representation could not appropriately be raised under Section 9(c). The evidence on which these findings rest is summarized below.

The Council is one of ten subordinate bodies of the Oregon State Building and Construction Trades Council. The Council operates in four counties and has 18 affiliated local unions (R. 13; Tr. 9-13, 156-161, G.C. Exh. 2, 16, 17, 19). Holstrup is secretary-treasurer of the Council. Holstrup also holds offices in and acts on behalf of some of the local unions (R. 2-3; Tr. 8-9, 17, 29, 72, 79-80, 92-93, 151, 154, 155, G.C. Exh. 12 [p. 13]).

R. A. Chambers & Associates is a general contractor and builder in the construction industry, and is located in Eugene, Oregon. On November 29, 1956, Chambers signed a Council agreement of statewide application. This memorandum agreement did not deal directly with terms and conditions of employment. Rather, the agreement was aimed primarily at requiring the employer signatories to hire only members of the Council's local unions. The agreement was for 1 year with automatic renewal unless 30 days notice of cancellation was given. From 1956 until 1965 and the events described below, the Council did not charge Chambers with violating the agreement, Chambers having been somewhat unconcerned with the agreement's existence and automatic renewal on November 29 of each year (R. 13-14; Tr. 15-16, 39-41, 45-47, 53-54, 65-69, R. Exh. 4).

In early January 1965, Chambers joined the Eugene Contractors Association ("Association"), which represents contractors in the area, and designated it as his exclusive bargaining spokesman (R. 14; Tr. 27-28, 43-44, 57, 59, 61, 64, 88-89, 95-96, 126). On February 4, 1965, Francis Kelley, the president of the Association, wrote Horstrup (the Council's

secretary-treasurer), stating that the Association had been assigned the bargaining rights of 15 named contractors, including Chambers. President Kelley also stated that these employers were giving notice of termination on their respective anniversary dates of the statewide memorandum agreement with the Council, and would not enter into a successor agreement of this nature with the Council (R. 14; Tr. 27-28, 43-44, 58-60, 87-88, 95-96, 155; G.C. Exh. 3). This February 4 notice applied to Chambers' 1956 memorandum agreement with the Council, which, as shown, had an anniversary date of November 29 and was not renewed if 30 days notice of termination were given.

The Association entered into negotiations with various local unions. Chambers was present and active in some of these negotiations, and in early 1965 became a party to four collective bargaining contracts which the Association entered into. The locals with which these four contracts were executed were the Laborers, Carpenters, Iron Workers, and Cement Masons. The contracts had various termination dates in 1967 and 1968. Horstrup participated in the negotiations with the Cement Masons and is a signatory to their contract with the Association (R. 14 n. 3; Tr. 28-34, 47-53, 55-56, 73, 76-80, 92-93, 123-124, G.C. Exh. 12 [p. 13], 13, 14, 15). When these contracts were executed, the employees of Chambers, whose work force averages 25, mostly carpenters and laborers, were all members of the appropriate local union (R. 34; Tr. 37-39, 54-57, 60-61, 116, 121-122, 129-131).

On or about November 24, 1965, Horstrup advised Chambers that the memorandum agreement with the Council expired on November 29, and invited Chambers to sign a new agreement. This new statewide agreement (hereafter

"Memorandum Agreement") is a modification and expanded form of the 1956 agreement which Chambers had signed.

The Memorandum Agreement provides, *inter alia,* that the employer will comply with the contracts entered into with the local craft unions, with certain exceptions. For example, the Memorandum Agreement specifies that the provisions in the local agreements respecting strikes, lockouts, grievance, arbitration, and jurisdictional disputes shall not be binding on the Council. The agreement specifies, in effect, that in the event of a failure of the employee to abide by the agreement, the employer's employees may cease work without risking discharge. The agreement also provides that employees may refuse to cross a primary picket line authorized by the Council. In contrast, the contracts Chambers executed with the local unions (*e.g.,* the Carpenters and the Laborers), contain arbitration and no-strike commitments, and commitments to furnish workers on request. The Memorandum Agreement sets forth various restrictions on subcontracting of unit work falling within the jurisdiction of the local unions. Basically, the employer is required to subcontract such work only to contractors who are signatories to contracts with local affiliates of the Council. The local contracts executed by Chambers contain lesser restrictions on subcontracting. The Laborer's contract, for example, requires only that a subcontractor must adhere to standards of employment contained in the Laborers' agreement. The Memorandum Agreement may not be modified by the locals without the Council's consent (R. 15-16, 34; Tr. 70-72, G.C. Exhs. 12 [pp. 3, 9-10], 13 [pp. 8-9], 14 [pp. 3, 9-10], 15 [pp. 3, 12-13]).

In response to Horstrup's request to sign the Council's Memorandum Agreement, Chambers stated that he had assigned his bargaining authority to the Association (R. 14; Tr.

39-43). As shown, in February 1965, several months before, the Association had given Horstrup notice of termination by Chambers of the 1956 agreement, and notice that he would not sign a successor memorandum agreement with the Council.

On April 1, 1966, Horstrup visited a Chambers' construction project. Horstrup told Chambers' foreman, Tobey Peoples, that Chambers had refused to "sign up" with the Council; therefore, Horstrup "might have to picket" him (R. 15; Tr. 73-75, 98-100). On April 13 Horstrup returned and told Foreman Peoples that the project would be picketed the following day. Peoples advised Construction Superintendent Robert Gardner, who telephoned Horstrup that afternoon for an explanation and asked how the picketing could be prevented. Horstrup replied that Chambers would have to sign the "Building Trades Council" agreement, that is, the Memorandum Agreement discussed above (R. 15; Tr. 100-103).

The next day, April 14, 1966, Horstrup began picketing the project, with picket legends reading as follows (R. 13, 15; Tr. 15-16, 44-45, 100-102, 107-108):

> R. A. Chambers and Assoc. Working Conditions Less Than Enjoyed by Unions Affiliated with Lane-Coos-Curry & Douglas County Building Trades Council. No disputes with any other contractor exists on the job.

As a result of the picket line approximately 15 of Chambers' employees refused to enter the project and ceased all work. Employees of electrical and plumbing subcontractors on the job also refused to work. On April 21 the picketing ceased. The purpose of the picketing concededly was to "get" Chambers to sign the Council's Memorandum Agreement (R. 15; Tr. 15, 73-75, 102-103, 105-108).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Council and its agent, Secretary-Treasurer Horstrup, violated Section 8(b)(7)(A) of the Act by picketing Chambers for an object of recognition and bargaining at a time when Chambers was lawfully recognizing other unions and a question concerning representation could not appropriately be raised under Section 9(c) of the Act (R. 15-16, 33-34). The Board's order requires the Council and Horstrup to cease and desist from the unfair labor practices found and to post the customary notice (R. 18-19, 35).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COUNCIL AND ITS AGENT, JENS HORSTRUP, VIOLATED SECTION 8(b)(7)(A) OF THE ACT BY PICKETING R. A. CHAMBERS AND ASSOCIATES.

INTRODUCTION

Section 8(b)(7)(A), in relevant part, proscribes picketing by an uncertified union or its agents where "an object" thereof is to force or require an employer "to recognize or bargain" with the labor organization as bargaining representative of the employer's employees where the employer has lawfully recognized another union as bargaining representative, and "a question concerning representation may not be raised under Section 9(c) of this Act" (*infra*, p. A-1). It is uncontested that the Council and its Secretary-Treasurer, Horstrup (collectively referred to hereafter as the Council), picketed

Chambers to obtain his signature to the Council's Memorandum Agreement, that this agreement covered Chambers' employees, and that at the time of the picketing Chambers was recognizing the Council's affiliated locals as the representatives of his employees and was a party to existing contracts with the locals. Thus, solely in issue are, first, the Board's finding that an object of the Council's picketing was recognition and bargaining; second, the Board's finding that a question concerning representation could not appropriately be raised. We discuss these issues below.

A. Substantial evidence on the whole record supports the Board's finding that the picketing was for an object of recognition and bargaining.

Section 8(b)(7)(A) protects the parties where the lawful authority of an incumbent union to continue as the employees' exclusive representative may not presently be challenged under the Act's election procedures. The section prevents an attempt to disrupt the bargaining relationship when the attempt is in the form of picketing by another union with an object of compelling the employer to deal with it as an employee representative. See *N.L.R.B. v. Local 3, I.B.E.W.*, 362 F. 2d 232, 234 (C.A. 2); Meltzer, *Organizational Picketing and the N.L.R.B.*, 30 Univ. Chi. L. Rev. 78, 79, 81-83 (1962). Cox, *The Landrum-Griffin Amendment to the NLRA*, 44 Minn. L. Rev. 257, 262-266 (1959). That the picketing may have other legitimate objectives is immaterial; the existence of "an object" forbidden by the statute is sufficient. A finding that it existed is a factual one, and is entitled to affirmance by the reviewing court if supported by the record. *N.L.R.B. v. Local 3, I.B.E.W., supra,* 362

F. 2d at 235. Accord: *N.L.R.B. v. Carpenters Local No. 2133, etc.*, 356 F. 2d 464, 465-466 (C.A. 9); *Dayton Typographical Union No. 57 v. N.L.R.B.*, 326 F. 2d 634, 639-645 (C.A. D.C.); *Local 705,Teamsters v. N.L.R.B.*, 307 F. 2d 197, 198 (C.A. D.C.); *N.L.R.B. v. Local 182, Teamsters,* 314 F. 2d 53, 58-59 (C.A. 2); *Penello, etc. v. Retail Store Employees,* 188 F. Supp. 192, 199 (D.C. Md), aff'd 287 F. 2d 509 (C.A. 4).

The picketing union's objective need not be an explicit granting of recognition to fall within the statutory interdiction. It is sufficient that the employer can avoid picketing only by acceding to union demands which are tantamount to demands for recognition. *Centralia Building & Construction Trades Council v. N.L.R.B.*, 363 F. 2d 699, 701 (C.A. D.C.). Accord: *N.L.R.B. v. Local 182, Teamsters, supra,* 314 F. 2d at 57-58. The Council's admission that it picketed Chambers to obtain his signature to the Memorandum Agreement is cogent evidence that the picketing was for the proscribed objective. The Board, with court approval, has consistently taken the position that a demand that an employer sign a labor agreement establishes, at least *prima facie,* an object of recognition and bargaining within the statutory meaning. See, *e.g., N.L.R.B. v. Local 3, I.B.E.W., supra,* 362 F. 2d at 235-236; *N.L.R.B. v. Carpenters Local No. 2133, etc., supra,* 356 F. 2d at 466; *N.L.R.B. (Kansas Labor Press, Inc.) v. Lawrence Typographical Union No. 570, AFL-CIO,* 376 F. 2d 643, 653 (C.A. 10), and cases there cited. See also, *National Packing Company, Inc. v. N.L.R.B.*, 377 F. 2d 800, 803-804 (C.A. 10).

Essentially, the Council asserts (Br. 16) that the Memorandum Agreement contemplated the continued "sanctity" of the locals' contracts and bargaining authority, and did not fix the employees' basic terms of employment; therefore, no

recognitional or bargining objective was involved in the demand that Chambers become a party to the agreement. The incriminating demand, however, need not be for an agreement which covers all bargainable matters; further, the agreement need not acknowledge (indeed, it may expressly deny) that the picketing union is acting as a representative of the employees. Thus, in *Centralia Building & Construction Trades Council v. N.L.R.B., supra,* the union picketed to compel execution of an agreement which would provide only that the employees would receive wages and certain fringe benefits equal to those being paid to employees working under union contracts. Although the union repeatedly advised the picketed employer that it was not seeking "recognition," the Board concluded that Section 8(b)(7) applied and the Court held that the Board's conclusion was an allowable one: ". . . the net effect of [the employer's] entering upon the proposed agreement would have been to establish the [picketing union] as the negotiator of wage rates and benefits paid [the employer's] employees." (363 F. 2d at 701).

The Council was attempting to perform the role of "negotiator" in respect to collective bargaining matters within the exclusive statutory authority of the local union affiliates who represented the employees. As shown, *supra,* p. 5, the Memorandum Agreement which the Council sought to obtain by a picket line could not be modified by the locals without the Council's consent. That agreement purports, *inter alia,* to qualify the no-strike and arbitration obligations contained in the agreements with the locals. Moreover, the Memorandum Agreement places restrictions on subcontracting which are not contained in the agreements with the locals. Under settled law, employees have a statutory right to bargain through their own duly selected bargaining agent to

obtain legitimate restrictions on the subcontracting of unit work. See *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203. *National Woodwork Manufacturers Association, et al. v. N.L.R.B.*, 386 U.S. 612, 637-643. Picketing by another union to regulate the above terms and conditions of employment obviously preempts subjects of collective bargaining and warrants the Board's finding of a recognition and bargaining objective.

The regulation sought by the Council in the Memorandum Agreement may not be characterized as "in no way affect[ing] the relationship of [Chambers] with his own employees . . ." (Council Br. 16). The contractual no-strike and arbitration commitments undertaken by employees are cogent matters in the bargaining process, and central to the statutory policy of industrial peace. The proposal to restrict subcontracting to unionized employers, furthermore, is not merely an additional and permissible restriction supplementing those contained in Chambers' contracts with the locals. This assertion rests on the faulty premise that the choice of subcontractors with whom Chambers does business is the primary concern of the Council, as a caretaker spokesman for the locals generally. As demonstrated, however, the employees' chosen bargaining agent has the exclusive authority to negotiate limitations on subcontracting. The record is clear that Chambers and the locals had struck a bargain on that subject, and it may be assumed that acceptance of the lesser restrictions by the locals is reflected in their negotiating more favorable terms for the employees on other matters. The Council's attempt to alter this accommodation may not be dismissed as involving no intrusion on the bargaining relationships between Chambers and the locals.

For example, in *Dallas Building and Construction Trades Council*, 164 NLRB No. 139 (65 LRRM 1170), petition for

review pending, No. 21,057 (C.A. D.C.), a similar building trades council picketed employers whose employees, like those of Chambers, were currently represented by the council's affiliated locals and were covered by collective bargaining agreements negotiated with the locals. The object of the council's picketing also was to obtain agreements with the employers which provided, in essence, that if the employer decided to subcontract any work within the jurisdiction of the locals, such work would be subcontracted only to employers who were party to a bargaining contract with the appropriate local. In *Dallas*, the Board rejected the council's claim that its "threats and picketing did not have an object of recognition or bargaining because its proposed agreement about the subcontracting of work would have little or no effect on the employees of the picketed general contractors." (65 LRRM at 1171). As the Board emphasized, the restrictions placed on subcontracting delimit the employers with whom the signatory employer may deal, and thus influence whether he does the work with his own employees or by subcontract. As a result, the council's subcontract proposal would "significantly affect employees of the picketed general contractors to the extent that it regulated subcontracting of such work" (*ibid.*).

The Council (Br. 21-23) relies on Section 8(e) of the Act, which was added in 1959 to make unlawful various forms of "hot cargo" agreements. Under the proviso to that section, the building trades unions may seek agreements committing the employer to work on only those construction projects where all other on-site contractors and subcontractors recognize the appropriate union (*infra*, pp. A-2, 3). A union may not picket to enforce such union signatory subcontracting clauses. As the Council asserts, however, picketing solely to obtain the "proviso clause" does not

violate the secondary boycott prohibitions of Section 8(b)(4) of the Act. See *Northeastern Bldg. & Constr. Trades Council, et al. (Centlivre),* 148 NLRB 854, enforcement denied on unrelated grounds, 352 F. 2d 696 (C.A. D.C.); *N.L.R.B. v. I.B.E.W., Local Union No. 683, AFL-CIO,* 359 F. 2d 385 (C.A. 6). Assertedly, the Council's Memorandum Agreement constituted a valid proviso agreement obtainable by use of a picket line.

Initially, this argument overlooks the recognitional and bargaining objective the Memorandum Agreement entailed by altering the no-strike and arbitration commitments contained in Chambers' contracts with the locals. The subcontracting proviso to Section 8(e) has nothing to do with these and other terms and conditions of employment, or with picketing to obtain them. In this respect, the proviso clearly does not grant the building trades unions any special privilege to engage in recognitional picketing.

No reason exists, moreover, to presume that Congress intended the restrictions of Section 8(b)(7) to be ignored whenever it may be said that the picketing is to obtain a subcontracting clause permitted by Section 8(e). The latter section and Section 8(b)(4) are directed at the use of a secondary boycott to implicate neutral employers in disputes not their own. See *N.L.R.B. v. District Council of Painters No. 48 and Paint Makers Local Union No. 1232,* 340 F. 2d 107 (C.A. 9), cert. denied, 381 U.S. 914; *N.L.R.B. v. Joint Council of Teamsters, No. 38,* 338 F. 2d 23, 28 (C.A. 9). On the other hand, Section 8(b)(7) applies to primary picketing and was enacted to limit the circumstances in which an employer may be picketed by a union which seeks to act as a bargaining spokesman for the picketed employer's employees.

Different statutory policies are thus embodied in these various subsections, and they must be construed harmoniously.

The Board applied them in that manner here when it condemned as recognitional the Council's picketing of Chambers to obtain, *inter alia*, a clause limiting subcontracting to union signatories. This does not operate to cut off Chambers' employees from concerted activity to obtain contractual clauses permitted by the proviso to Section 8(e). The Board's holding bars picketing for a proviso agreement only to the extent that such picketing is engaged in by a union other than the representative of the employees and, therefore, exceeds the limitations on recognitional picketing embodied in Section 8(b)(7).[3]

It is asserted that picketing by Council officials to obtain the memorandum agreement should be permitted since, in the distinct collective bargaining relationships in the construction industry, council securing of such agreements is a "time-honored procedure used to coordinate and control building trades unions" (Council Br. 11-14; *amicus* Br. 9-16). This alleged practice, however, does not impair the Act's placing of bargaining authority exclusively in the locals, where only those labor organizations had been designated by the employees. They had not selected the locals' parent or affiliated bodies, or included them in the grant of bargaining authority. See *N.L.R.B. v. Taormina Co.*, 207 F. 2d 251, 254 (C.A. 5); *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 236 F.2d 898, 904-905 (C.A. 6), affirmed in relevant part, 356 U.S. 342, 350; *N.L.R.B. v. National Truck Rental Co.*, 239 F.2d 422, 425 (C.A. D.C.), cert. denied, 352 U.S. 1016. See also, cited by the Council (Br. 26), *Independent Stave Co., Inc. v. N.L.R.B.*,

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[3] Thus, the Board's decision plainly does not result in "taking away from . . . construction industry bargaining . . . that which i[s] authorized in Section 8(e) and 8(b)(4)." (pp. 9-10 of the brief of the *amicus curiae*, Building and Construction Trades Department, AFL-CIO).

352 F. 2d 553, 559 (C.A. 8), cert. denied, 384 U.S. 962. Compare *I.B.E.W. (Franklin Electric Construction Co.,* 121 NLRB 143, 146-148; *Chicago Typographical Union No. 16, etc.,* 86 NLRB 1041, 1045-1047, 1052-1055, 1060 n. 5, enforced *sub nom. American Newspaper Publishers Association v. N.L.R.B.,* 193 F. 2d 782, 804-805 (C.A. 7), cert. denied as to this aspect, 344 U.S. 812.[4]

If the Council's position were accepted, then employees in the construction industry would negotiate a contract with their employer, through their own lawful bargaining representative, without any assurance that another labor organization would be barred from altering the terms of the bargain by picketing. Section 8(b)(7), however, was intended to strengthen the federal policy of ensuring employees a free choice in the selection or rejection of a bargaining representative. See *N.L.R.B. v. Drivers, Local No. 639 (Curtis Bros.),* 362 U.S. 274, 291. Here, as we show *infra,* the current choice of Chambers' employees to be represented exclusively by the locals could not be challenged. The Board properly held that the Council could not interpose indirectly into those bargaining relationships by attempting to force Chambers to enter into a contract affecting the employees' employment rights. It is no defense that in picketing Chambers the Council was not seeking to displace the locals. As shown, the statute has consistently been held a bar to picketing to compel recognition as a collective

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[4] Application of the statute in a manner consistent with Congressional objectives, moreover, is required even if, as asserted, it bears more heavily on the bargaining relationships in the construction industry. As held in a slightly different context: "We also realize the difficulty the building crafts have with the secondary boycott provisions of the . . . Act, but this Court is not the forum in which to seek relief from what the union characterizes as 'the shackles' of this statute." *Local No. 5 United Ass'n, etc. v. N.L.R.B.,* 321 F. 2 366, 370 (C.A. D.C.), cert. denied, 375 U.S. 921.

bargaining spokesman on matters reserved for the exclusive employee representative, and not just picketing to oust the representative.[5]

Moreover, one of the underlying purposes of Section 8(b)(7) was to insulate an employer from " *'blackmail'* picketing by a union not lawfully entitled to recognition as representating a majority of the employees." *Dayton Typographical Union No. 57 v. N.L.R.B., supra,* 326 F. 2d at 637. See also *Local 542, Operating Engineers (R. S. Noonan, Inc.),* 142 NLRB 1132, 1135, enforced 331 F. 2d 99, 107 (C.A. 3), cert. denied, 379 U.S. 889. In the circumstances of this case, Chambers was entitled to that protection. A different result is not dictated here by the absence of evidence that the locals objected to the Council's intrusion. As stated by the Board in *Dallas* (*supra,* 65 LRRM at 1171-1172):

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[5] The use of the definite article in Section 8(b)(7), which speaks of recognition or bargaining as "*the* representative" (*infra,* p. A-1) is scarcely a word of limitation such as to establish a congressional intent to regulate only picketing to become "the exclusive" bargaining agent (*amicus* Br. 2-9). Compare, *Craig v. Boyes,* 11 P. 2d 673, 674, 123 Cal. App. 592; *Stevens v. Duncan,* 7 S.E. 2d 745, 746, 189 Ga. 730. And this argument, so at odds with the statutory scheme, has no support in the trial examiner's adopted decision in *I.B.E.W., Local Union No. 903 (Pass Development Inc.),* 154 NLRB 169, 176 (see *amicus* Br. 8 n. 6). There it was found that the council and an affiliated electricians' local engaged in unlawful secondary boycott picketing of a general contractor to force him to cease using a nonunion electrical subcontractor. The 8(b)7)(C) allegation of the complaint was dismissed. In significant contrast to the case at bar, however, the evidence did not show that the council or the local was seeking to negotiate the terms and conditions of employment of the employees of the picketed employer — the general contractor who employed no electricians.

We deem it immaterial that the Council-affiliated unions that have contracts with the Association would not consider the proposed subcontracting clause an intrusion on their status as collective bargaining representatives. Employers in the Association said the clause would intrude on their collective-bargaining relationships. Even if we were to find that the unions had waived their rights here, and that such waiver should influence the Board's unfair labor practice conclusions, the employers are entitled to the protection of Section 8(b)(7)(A) against actions which tend to erode or even destroy their right to operate, unimpeded by outsiders' threats and picketing, under the collective-bargaining terms lawfully negotiated with their employees' representatives.[6]

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[6] Contrary to the Council's contention (Br. 18, 21) the Board's previous decisions have not permitted such picketing. As shown, *supra*, p. 16 n. 5, *I.B.E.W., Local 903*, is wholly distinguishable on its facts. *Bldg. and Construction Trades Council, et al.*, 141 NLRB 38, 39 n. 2, 49-50, is like *I.B.E.W.* The Board found unlawful secondary boycott picketing of a general contractor to force him to cancel his contracts with non-union subcontractors, but dismissed an 8(b)(7)(C) allegation for lack of evidence that the Council or its local was seeking to negotiate on behalf of the general contractor's employees. *Blinne Constr. Co.*, 135 NLRB 1153, involved wholly dissimilar circumstances, where the union conceded the picketing was recognitional but urged defenses having no bearing here.

B. **Substantial evidence on the whole record supports the Board's finding that the picketing was conducted at a time when Chambers was lawfully recognizing other unions and a question concerning representation could not appropriately be raised under Section 9(c) of the Act.**

The Council's picketing for recognition and bargaining violated Section 8(b)(7)(A) if, as the Board further found, at the time of the picketing Chambers was lawfully recognizing other unions and a question concerning representation could not have been raised under the election procedures of Section 9(c) of the Act.

Initially, the Council asserts that Chambers' recognizing and contracting with the locals in early 1965 were unlawful, since until the Council's 1956 memorandum agreement with Chambers expired on November 29, 1965 (see *supra*, pp. 3-4, 5-6), the Council alone was the "exclusi[ve]" representative of the employees (Br. 24-27). This argument – a complete *volte-face* against the defense that the statewide memorandum agreement is only a caretaker agreement for the locals in the area of subcontracting, and does not establish the bargaining relationship between the Council and general contractors – must be totally rejected on a single ground. As the Trial Examiner noted (R. 15), the Council may not rely on any alleged illegal execution of contracts between the locals and Chambers. Those contracts were executed over a year before the Council's April 1966 picketing, with no unfair labor practice charge having been filed alleging the contracts' illegality on any ground.[7] The

[7] The Council's attack on the legality of its locals' contracts is particularly anomalous when viewed against Secretary-Treasurer Horstrup's participation in negotiations and execution of at least one of the locals' agreements with Chambers (*supra*, pp. 3, 4).

6-month limitations period in Section 10(b) of the Act (*infra*, pp. A-5,6) thus barred such a charge and any claim in this proceeding that execution of the contracts established an unlawful bargaining relationship. *International Hod Carriers, etc., Local 1298 (Roman Stone Construction),* 153 NLRB 659 n. 3; *N.L.R.B. v. Local 3, I.B.E.W., supra,* 362 F. 2d at 236, enforcing 153 NLRB 717, 724-725. See *Local Lodge No. 1424, I.A.M., AFL-CIO v. N.L.R.B. (Bryan Mfg. Co.),* 362 U.S. 411. As the Board explained in *Roman Stone Construction, supra,* Section 8(b)(7)(A) was "intended in part to promote stability in established bargaining relationships, an interest also served both by the contract-bar rules and by Section 10(b)" of the Act. As the Board reasoned (153 NLRB at 659 n. 3):

> To hold, under the conditions presented herein, that an incumbent union's representative status may be placed in issue as a defense to 8(b)(7)(A) charges would permit a rival union to accomplish by means of picketing what it could not achieve under established bargaining procedures. Such an application of 8(b)(7)(A) would offend the very policy which that Section was designed to further. Consistent with the congressional scheme, it is our opinion that the term "lawfully recognized" was meant to include all bargaining relationships immune from attack under Sections 8 and 9 of the Act. Accordingly, and as [the contracting union's] representative status could not be litigated under any other Section of the Act, we [hold] that such testimony could not be adduced in the 8(b)(7)(A) proceeding for the purpose of collaterally attacking [the contracting union's] status as statutory bargaining representative.

The locals' contracts also precluded a question concerning representation at the time of the Council's picketing. Under the Board's "contract bar" rules the Board generally will not conduct an election during the first 3 years of a collective bargaining agreement with a lawfully recognized representative. See *General Cable Corp.*, 139 NLRB 1123. As shown, the Council picketed Chambers when he was a party to contracts with the locals which had been in effect for approximately a year. The Council does not dispute that Congress intended to ban recognitional picketing when a question concerning representation could not be raised by virtue of the contract-bar principles. See, *N.L.R.B. v. Local 3, I.B.E.W.*, *supra,* 362 F. 2d at 236; Cox, *The Landrum-Griffin Amendment to the NLRA,* 44 Minn. L. Rev. 257, 265 (1959).

The Council contends, however, that Section 8(f) of the Act requires the Board to view the locals' contracts as no bar to an election (Br. 27-31). Section 8(f) partially exempts construction industry bargaining contracts from the strictures of Section 8(a)(3) of the Act. The first clause of Section 8(f) allows "prehire agreements" by providing that a contractor's labor agreement with a building trades union shall not be considered unlawful because "the majority status of such labor organization has not been established prior to the making of the agreement . . . " The final proviso to the section provides, however, that "any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a[n election] petition filed pursuant to section 9(c) . . . " (*infra,* pp.A-3, 4). According to the Council, Chambers' contracts with the locals are nominally invalid for lack of majority support when executed, but are prehire agreements validated only by Section 8(f)(1);[8] hence, it is claimed that the proviso to that section

[8] Any claim of actual invalid execution is, as shown, barred by Section 10(b) of the Act.

prohibits a finding that at the time of the Council's recognitional picketing a Board election was precluded by the contract-bar doctrine. The Board properly rejected this contention, concluding that the contracts here were not prehire agreements within this statutory framework (R. 34).

As shown, *supra*, p. 4, the record affirmatively shows that Chambers' employees were members of the locals with which Chambers contracted, and his average work force of 25 employees had been union members for many years, as the Council was well aware (see, Tr. 65-66, 131). Moreover, the contracts themselves are *prima facie* evidence of majority support. As stated by the Second Circuit (*N.L.R.B. v. Local 3, I.B.E.W., supra,* 362 F. 2d at 235):

> The Board has taken the position that when an employer recognizes a union and executes a collective bargaining agreement with it, a rebuttable presumption arises that the union represents a majority of the employees. *Shamrock Dairy, Inc.,* 119 NLRB 998, 1002 (1957), order enforced *sub nom. International Brotherhood of Teamsters v. N.L.R.B.,* 280 F. 2d 665 (D.C. Cir.), cert. denied, 364 U.S. 892 (1960). We believe that the Board is justified in requiring that a party attacking the legality of an employer's recognition of a union should at least present *prima facie* evidence of illegality. [Footnotes ommitted.]

The Council presented no evidence to rebut the proof of majority support thus established by the record. *Cf. N.L.R.B. v. Gulfmont Hotel Company,* 362 F. 2d 588 (C.A. 5). This is not a case, therefore, where the contracts would be unlawful but for the exculpatory language of Section 8(f)(1). Accordingly, the proviso to that section does not apply to prohibit

Chambers' contracts with the locals from operating as a bar to a Board election: the proviso is directed solely at agreements which "would be invalid" but for the first clause in the section. *Island Construction Co., Inc.,* 135 NLRB 13, 14-16; *N.L.R.B. v. Local 3, I.B.E.W., supra,* 362 F. 2d at 236, enforcing 153 NLRB 717, 724-725; *Dallas, supra,* 65 LRRM at 1172. Accord: *Houston Chapter, Associated General Contractors of America, Inc., et al.,* 143 NLRB 409, 411, enforced 349 F. 2d 449, 452 (C.A. 5), cert. denied, 382 U.S. 1026.[9]

The legislative history supports the Board's view that a construction industry bargaining agreement entered into by an employer essentially to cover his current and somewhat stable work force comprised of union members, is not a prehire agreement within the intendment of Section 8(f)(1) and the proviso to that section. The statute was amended to permit such agreements where, because of the unique features of the construction industry, a contractor needs a quick source of labor for a temporary period. The contractor may need to arrange for his labor needs and to determine the cost thereof before undertaking the construction contract. Accordingly, Section 8(f)(1) was intended to permit the contractor and the union to enter into a collective bargaining agreement before a representative number, or any, of the affected employees are hired. See I & II Legislative History of the LMRDA of 1959 (GPO 1959), pp. 424-425, 451-452, 777-778, 1067, 1082, 1289, 1577, 1643, 1715, 1830. As explained by then Senator John F. Kennedy,

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[9] *Alton-Wood River Building and Construction Trades Council,* 144 NLRB 260, 262-263, and other cases cited by the Council do not hold to the contrary. In *Alton-Wood,* for example, a prehire agreement was found and the proviso to Section 8(f) held applicable where the employer contracted with the union and told his wholly non-union work force they were "automatically covered"; thereupon, on the employer's suggestion, the employees joined the union.

Section 8(f)(1) permits, contrary to the usual proscription, "a prehire agreement where the majority status of the union had not been established." (*id.* at 1715). Congress thus intended to "sanction * * * pre-hire agreements in the construction industry [when] the majority status of the union cannot be established." *N.L.R.B. v. Local 542, Operating Engineers, supra,* 331 F. 2d at 105-106. Accord: *Bricklayers & Masons International Union, Local No. 3, et al.,* 162 NLRB No. 46, petition for enforcement pending, No. 22,337 (C.A. 9).

The considerations premising the grant of this special privilege do not apply when, as here, the contract entered into by a contractor fixes the terms and conditions of his current complement of employees who are members of the contracting union. Rather, in these circumstances the employees, the employer, and the union alike are entitled to the period of stability which the contract-bar doctrine, by precluding an election for a reasonable period of time, normally affords. The Board's determination to apply the doctrine is, we submit, well within the discretion vested in the agency in such matters. See *N.L.R.B. v. Libbey-Owens-Ford Glass Co.,* 241 F. 2d 831, 836 (C.A. 4); *Local 1545, United Brotherhood of Carpenters, etc. v. Vincent, et al.,* 286 F. 2d 127, 131 (C.A. 2).

CONCLUSION

Accordingly, it is respectfully submitted that the petition to review and set aside the Board's order should be denied, and that the Board's order should be enforced in full.

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February 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

* * *

UNFAIR LABOR PRACTICES

* * *

[Sec. 8] (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9 (c) of this Act, (B) where within the preceding twelve months a valid election under section 9 (c) of this Act has been conducted, or (C) where such picketing has been conducted wit hout a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days

from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9 (c) (1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8 (b).

* * *

[8] (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided*

further, That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities

for employment based upon length of service with such employer, in the industry or in the particular geographical ard area: *Provided,* That nothing in this subsection shall set aside the final proviso to section 8 (a) (3) of this Act: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e).*

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* Section 8 (f) is inserted in the Act by subsection (a) of Section 705 of Public Law 86-257. Section 705 (b) provides:

> Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law.

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* * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * *

[Sec. 10] (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with

the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in

part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States

Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *